



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

NOT REPORTABLE

Case no: JR1121/13

In the matter between:

SUPERCARE SERVICES GROUP (PTY) LTD

Applicant

and

**COMMISSIONER OLOTA NO
COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION
TAWUSA OBO MAUREEN RAKODI**

First Respondent

Second Respondent

Third Respondent

Heard: 6 November 2024

Delivered: 15 January 2025

Summary: Application to review and set aside the arbitration award of the first respondent that the applicant demoted the third respondent's member and thereby committed an unfair labour practice. Held that the commissioner correctly found that there was a demotion, and the finding that the demotion constituted an unfair labour practice was reasonable. Application dismissed.

JUDGMENT

DANIELS J

Introduction

- [1] This is an application brought to review and set aside the arbitration award issued by the first respondent (hereafter the “commissioner”). The commissioner found that the applicant demoted the third respondent’s member, Ms Maureen Rakodi (“Ms Rakodi” or “the employee”) and awarded her relief. When the matter was argued, the third respondent’s representatives failed to appear. The matter proceeded in its absence.

Material facts

- [2] The facts of the matter are common cause:

2.1 Ms Rakodi was employed as a cleaner and then promoted to the position of contract team leader, where she would clean but also supervise the other cleaners. She was deployed by the applicant to work at the site of one of its customers, ABI Rustenburg depot (the “customer”).

2.2 Ms Rakodi signed an employment contract with the applicant which stated:

2.5. *The employee acknowledges that –*

2.5.1. the nature of the company’s business and its contract with various customers often necessitates

the transfer of staff from time to time with the consequence that employees may have to execute their duties at places and in areas different from those at which they were initially employed. In the circumstances, the employee specifically acknowledges that he/she understands that he/she may at any time be so transferred by the company to execute his/her duties at a place different from that at which he/she was initially employed and the employee hereby consents to the company effecting such transfers, provided –

2.5.1.1. two weeks' notice and reasons are to be given by the company to the employee for the proposed transfer."

(own emphasis)

2.3 On 2 October 2012, the customer emailed the applicant complaining about the poor quality of its services. In the email, the customer stated that the employee was "one of the worst performing people" and it demanded that she be removed from its premises immediately. The customer further indicated that if the service is not improved then it would "definitely consider other options."

2.4 To avoid the possible retrenchment of the employee, in the absence of any consultation with the employee or her union, the applicant decided to transfer her to the position of cleaner at Capitec.

2.5 The applicant approved the transfer on 31 October 2012, as indicated by the applicant's signed internal transfer form. On that date, the applicant informed the employee that she had been transferred to Capitec. Ms Rakodi failed to report for duty, but subsequently signed the internal transfer form and commenced her

duties at Capitec. In the internal transfer form, the employee effectively reserved her rights as follows:

“Not accepting the current conditions / I want to be transferred with the same conditions as before. I am prepared to work at Capitec”

- 2.6 The employee's conditions of employment changed upon transfer. Her monthly remuneration was reduced, from R2580, 68 to R1360, 32, as a result of the reduction of working hours. Her annual bonus reduced from R2330, 06 to R1360, 32 and she no longer received the team leader allowance. Her status was diminished because she was no longer a team leader, and no longer performed any duties applicable to team leaders.

Arbitration proceedings

- [3] The third respondent alleged that the applicant had committed an unfair labour practice and referred that dispute to the second respondent for conciliation, and when that failed, arbitration.

- [4] At arbitration, the applicant contended that:

- 4.1 It informed the employee several weeks earlier that the customer had complained about her performance,
- 4.2 It held a counselling meeting with the employee after the complaint was lodged by the customer, but there was no time to fully consult the employee because it was an emergency situation.

4.3 There was no demotion but only a transfer which it was entitled to implement.

4.4 The transfer (or demotion) was lawful because it occurred after proper notice, it gave reasons, and was based on its operational requirements.

4.5 The transfer was necessary to avoid the possible retrenchment of the employee.

4.6 If the transfer constituted a demotion, the employee waived her rights to challenge the demotion because she accepted it by signing the internal transfer form and working in the new position.

[5] The commissioner found that there was a demotion and it constituted an unfair labour practice. The reasons why the demotion was considered unfair are unclear, save that the absence of a proper consultation process was considered to be of great significance.

Legal principles

Grounds of review

[6] It is trite that the grounds of review must be pertinently set out in the applicant's founding and supplementary affidavits.¹ These grounds may not be extended in the replying affidavit or in heads of argument. In brief, the grounds of review pertinent to this judgment are as follows:

¹ *Communication Workers Union and others v SA Post Office Ltd and others* (2013) 34 ILJ 626 at paras 35 and 39

- 6.1 The applicant alleges that, contra the finding of the commissioner, it was not common cause that the employee was demoted. In para. 7.2 of its founding affidavit the applicant states that it *“at all times contended that this was a transfer specifically agreed to and envisaged by the individual third respondent’s contract of employment which resulted in a lesser position.”* In reply, the third respondent, in para 15 of its answering affidavit, states: *“At the same time the Employer ultimately conceded during that (sic) the arbitration that the drop in salary that Ms Rakodi received was a demotion.”* The applicant filed no replying affidavit.
- 6.2 It alleges that the commissioner failed to apply her mind to the evidence that the employee signed an employment contract in which she consented to any transfer provided that two-weeks’ notice was given together with reasons for the transfer.
- 6.3 It alleges that the commissioner failed to apply her mind to the fact that the employee had signalled her consent to the transfer by moving to the new position and performing her duties in her new post. ‘
- 6.4 It alleges that the ruling that the employee must be reinstated into her previous position is unreasonable, and, in fact, impossible.

Review applications in general

- [7] The arbitration process and the resulting arbitration award both constitute administrative action. Accordingly, section 33(1) of the Constitution requires that the process and the outcome must be lawful, reasonable, and procedurally fair. It was in this context that the Constitutional Court

fashioned the appropriate review test² in relation to CCMA arbitration awards in the following terms: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her?* The test has come to be known as the “Sidumo test” or the “reasonableness test.”

- [8] Subsequently, in *CUSA v Tao Ying Metal Industries and Others*³ (“Tao Ying”) the Court held at para 76:

“76] It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in Sidumo, the matter was put thus:

“Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.” (Own emphasis)

- [9] Thus, following *Tao Ying*, it is clear that the decision maker must apply his or her mind to all the issues that are material to a fair determination of the dispute. The failure of the commissioner to apply his or her mind to the material issues denies the parties a fair trial and, invariably, the outcome will be unreasonable.

- [10] In *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)*⁴ the court clarified that the *Sidumo* test did not extinguish the procedural grounds

² *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

³ (2008) 29 ILJ 2461 (CC) (18 September 2008)

for reviews contemplated in section 145(2)(a) of the LRA. However, the procedural defects alleged must indicate that the arbitrator misconceived the nature of the enquiry, or arrived at an unreasonable result.

- [11] In *Bestel v Astral Operations Ltd & others*⁵ the court considered the narrow scope of review and accepted that an arbitrator's finding would be unreasonable if it is unsupported by any evidence, based on speculation, disconnected from the evidence, supported only by evidence that is insufficiently to justify the decision, or if it was made in ignorance of evidence that was uncontradicted. The Court held that:

'... the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.' (Own emphasis)

- [12] In *Goldfields Mining SA (Pty) Ltd v CCMA and others*⁶ the court held that the concept of reasonableness embraces a wide range of outcomes, many of which may be reasonable. The outcome should not be evaluated on a piecemeal basis, but on the totality of the evidence.

- [13] In *Head of the Department of Education v Mofokeng and others*⁷ the court again confirmed that where an arbitrator fails to apply his or her mind to the material issues, this will usually indicate that the outcome is unreasonable or that the arbitrator misconceived the nature of the enquiry. However, when a mistake of fact or law occurs, what matters is its materiality - whether the error had a distorting effect on the outcome.

⁴ (2013) 34 ILJ 2795 (SCA)

⁵ [2011] 2 BLLR 129 (LAC) at para 18

⁶ (2014) 35 ILJ 943 (LAC) at para 14

⁷ [2015] 1 BLLR 50 (LAC)

Analysis of the grounds of review

[14] It is necessary to consider the grounds of review in the context of our law on demotions and unfair labour practices. In *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & others*, the court, per Zondo JP (as he was then stated):⁸

“[88] I agree with counsel for the appellant that the mere fact that the appellant's rank and remuneration were not going to change does not mean that the transfer to Pollsmoor could not or did not constitute a demotion. I agree, too, that the status, prestige, and responsibilities of the position are relevant to the determination of whether or not a transfer in a particular case constitutes a demotion...

[89] The appellant also did not consent to such demotion. In terms of the common law a demotion without the employee's consent is unlawful. In terms of the Labour Relations Act the demotion of an employee without his consent would be unfair...”

[15] In *Builders Warehouse v Benade*⁹ at para 14 the appeal court stated: “The court a quo is correct that a dispute about an alleged unfair labour practice extends to “unfair conduct relating to demotion”. The fact that the parties have agreed that the aggrieved employee accepts demotion is not a complete defence because the ambit of this unfair labour practice is wider than this. The implementation of an agreement to accept demotion, may constitute an unfair labour practice.” Relying on this authority, this court held that consent itself did not imply waiver of the right to challenge the

⁸ (2008) 29 ILJ 2708 (LAC)

⁹ (P/A 1/14) [2015] ZALAC 77 (5 May 2015)

fairness of the demotion.¹⁰ Accordingly, it is settled that consent on its own does not establish that the demotion was fair.

- [16] It is well established that consultation, or negotiation, is required before a decision to demote an individual can be fairly taken. In *Solidarity v Perishable Products Export Control Board & others*¹¹ the court considered the CCMA matter between *TOWU on behalf of Malan and Commuter Handling Services (Pty) Ltd*¹² and stated:

“41] If a demotion is the sanction for misconduct, it was found that it should be preceded by a disciplinary hearing and the misconduct procedures which are normally applicable. If it is an alternative sanction to dismissal it stands to reason that the procedural standards for a hearing prior to dismissal should also be complied with where the outcome is demotion...” (own emphasis)

- [17] The applicant contends that the transfer did not constitute a demotion, and the second respondent therefore had no jurisdiction to hear the dispute. The difficulty, for the applicant, is that the transfer easily meets the criteria for demotion. In brief, demotion contemplates the loss of benefits (remuneration) or status. Here, the employee was transferred to a position of lower status, and her remuneration was decreased. Both of these facts were common cause. At arbitration, the applicant conceded that her remuneration was reduced, and in this application the applicant referred to the employee’s new position (after transfer) as a “lesser position.” In the circumstances, there can be no question that the employee was demoted, and the commissioner correctly assumed jurisdiction.

¹⁰ *Solidarity on behalf of Taliep v Perishable Products Export Control Board & others* (2022) 43 ILJ 2592 (LC) at paras 38, 43 and 44

¹¹ Citation in fn. 10 above

¹² [2006] 3 BALR 327 (CCMA)

[18] It must be noted that, at arbitration, the commissioner suggested to the applicant's representative that it was common cause that the employee was demoted.¹³ The commissioner asked whether it was common cause that the employee's remuneration was reduced, and that her position changed. The representative conceded that her remuneration had been reduced and her position had also been changed though "her duties didn't change that much." The commissioner understood that the applicant had conceded that the employee had been demoted. It is hard to understand how the applicant could ever have disputed that the employee was demoted given that her status was diminished, her remuneration reduced, and her duties changed.

[19] The applicant's many contentions and submissions in its founding affidavit boil down to the same issue. The applicant contends that transfer was lawful (because the employer had a right to transfer the employee in terms of the employment contract) and, accordingly, the transfer (or demotion) was fair, prior consultation not being required under the contract. The employee consented to the transfer and it was therefore fair, alternatively she waived her right to challenge the demotion. These contentions are, in my considered view, as explained below, without merit:

19.1 Firstly, while it is correct that the employment contract deals with transfers, it is unclear whether clause 2.5 of the contract also covers transfers which are also demotions. In our common law, demotion is unlawful in the absence of consent. Where the employment contract intends to deprive an employee of common law rights, one would have expected the parties to do so clearly. There is no indication in the employment contract which requires that clause 2.5 must be interpreted to include demotions, thereby extinguishing the employee's common law rights to withhold her consent to a transfer which amounts to a demotion.

¹³ Record Vol. 2; Transcript p132 line 5 – p133 line 5

19.2 Secondly, it appears from the arbitration record that reasons for the transfer were not provided to the employee, as required by the employment contract.¹⁴ It seems that the employee was not given two weeks' prior notice of her transfer either. In any event, the applicant confuses lawfulness with fairness. Even if the transfer or demotion was lawful, this does not necessarily make it fair.

19.3 Thirdly, the authorities indicate that consent to demotion, by itself, is not a complete defence to the unfair labour practice claim. I see no reason to depart from these authorities.

19.4 Fourthly, on the facts of this matter, there was no unqualified consent to the demotion. The employee specifically reserved her rights to challenge the demotion.

[20] It is common cause that the employee was not consulted, and was informed that she had been transferred on the same day it was affected. The following of a fair process prior to demotion is not an insignificant issue. Prior consultation is fundamental to the fairness of the demotion. The applicant's submissions that consultation was not required because it was entitled to act unilaterally cannot be sustained. This confuses lawfulness with fairness. The argument that consultation was impossible because it was an emergency also cannot be sustained. The evidence demonstrated no reason why consultation could not have been held between the time of the complaint and the time when the applicant approved the transfer – from 2nd to 31st October. In my view, on this basis alone, the absence of consultation, the demotion constituted an unfair labour practice.

¹⁴ Record Vol. 2; Transcript p126 line 25 – p127 line 7

- [21] The applicant sought to justify the demotion by stressing that it was an alternative to retrenchment. However, this only gets the applicant so far. Retrenchment is not a *fait accompli* just because the employer cannot see any alternative and must be preceded by a proper joint, consensus-seeking, consultation process to seek to find *inter alia* alternatives to retrenchment. The applicant could have treated the employee's reservation of rights as a rejection of the transfer, and taken steps to address its operational requirements.
- [22] The commissioner reinstated the employee. The applicant argues that this was improper and requires it to perform an impossibility. I disagree. The applicant presented no evidence that the contract with the customer would automatically terminate if the employee were to be reinstated. In the circumstances, compliance with the award is not an impossibility. Section 193(4) of the Labour Relations Act 66 of 1995 confers a wide discretion upon the commissioner to grant relief, as he or she deems reasonable, to victims of unfair labour practices. I see no reason to interfere with such discretion.
- [23] The reasoning of the commissioner is of little moment. The task of the court, on review, is to assess all the evidence and determine whether the outcome was reasonable. In my view, the arbitration award is reasonable in relation to all the evidence before the commissioner.

Costs

- [24] The third respondent's representatives failed to appear at court. This conduct is unbecoming and I am inclined to punish such conduct with a cost order. During the course of this matter, the third respondent has been represented by three different firms. The applicant's practice note identifies third respondent's current representatives as a firm which had represented the third respondent during 2016, but had been substituted

by another firm in 2018. In the circumstances, given the confusion as to the identity of the third respondent's current representatives, it would not be proper to order them to pay the applicant's costs.

Conclusion

[25] In the circumstances, for the reasons set out above, I make the following order:

25.1 The application is dismissed,

25.2 There is no order as to costs.

Reynaud Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:
Snyman Attorneys (Ms T Moyo)

For the Third Respondent:
No appearance